# Wong Keng Liang v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09(S)-30 OF 2011
LOW HOP BING, KN SEGARA AND AZAHAR MOHAMED JJCA
22 FEBRUARY 2012

*Criminal Procedure — Sentencing — Principles — Offence of exporting snakes without permit — Guilty plea — Accused sentenced to six months imprisonment and fine of RM190,000 by magistrate — Decision reversed by High Court and accused sentenced to five years imprisonment — Whether sentence appropriate — Fundamental principles of sentencing — International Trade in Endangered Species Act 2008 s 10(a)*

At the magistrate's court, the accused pleaded guilty without reservation and unconditionally to the offence under s 10(a) of the International Trade in Endangered Species Act 2008 ('the Act') for exporting without permit 95 boa constrictor snakes ('the snakes') specified under scheduled species in the Third Schedule, Appendix 2 of the Act. According to the accused, he had failed to show any permit under the said Act to export the snakes which were seized at the Kuala Lumpur International Airport Terminal. In his mitigation, the accused was submitted that he had pleaded guilty as a first offender, thus saving judicial time and costs of calling the witnesses; he had repented and was remorseful; he had apologised and promised not to repeat the offence in the future; there were no aggravating factors to merit a heavy sentence; there was no use of criminal force unlike other crimes; the accused had a permit to import the snakes but did not have an export permit; and that the snakes were found in good conditions and no loss was caused to anybody. The prosecution submitted that Malaysia should not be made a transit point in the eyes of the international community and that this was the first case of the accused in Malaysia. The offence, as further submitted by the prosecution, was serious in nature and the maximum sentence was either a fine of RM1m or seven years imprisonment or both. It was further argued that a deterrent sentence by way of custodial sentence, in addition to a fine, should be imposed so that wild life smuggling was not worth a risk. The learned magistrate, accepted the guilty plea by the accused and convicted and sentenced him to six months imprisonment and a fine totalling to RM190,000 and in default, 12 months imprisonment. However, the decision was reversed by the High Court which set aside the sentence and substituted it with a five-year imprisonment term, without a fine and ordered that the RM190,000 be refunded to the accused. In the present appeal, the accused raised a question of immense public

importance, particularly in relation to the fundamental principles of sentencing.

**Held**, allowing the appeal:

(1) Section 87 of the Subordinate Courts Act 1948 set the ceiling of five year imprisonment and a fine of RM10,000 as maximum sentencing jurisdiction of the magistrate's court. Being charged in the magistrate's court, the sentencing jurisdiction of the magistrate's court under s 87 was applicable to the accused. In imposing a five-year imprisonment term, the High Court judge had indeed awarded the maximum custodial sentence which the magistrate's court as the sentencing court could impose under the law. This kind of maximum sentence was legally reserved for the most serious offence, without any mitigating factor (see paras 10–11).

(2) The learned High Court judge also failed to take into consideration the guilty plea by the accused. It is trite law that the guilty plea of the accused is a mitigating factor and 'first offender' had been recognised as a mitigating factor. The guilty plea by the accused allowed the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial (see paras 12–13).

(3) The accused was charged with an offence of exporting the snakes without a permit and not charged with 'trafficking' in wild life. He had lawfully imported the animals and had not smuggled them into the country. There was also no evidence to suggest that he would not have been granted the permit to export the animals by the authorities and neither was there evidence to suggest that he intentionally did not apply for the permit because he knew that he would not be granted with the permit (see paras 16–17).

(4) The accused had spent 17 1/2 months in prison as there was no stay of execution of the custodial sentence granted by the High Court. The period of 17 1/2 months would serve the interests of justice. The court set aside the five year custodial sentence imposed by the High Court and substituted it with a sentence of 17 1/2 months (see paras 19–21).

**[Bahasa Malaysia summary**

Di mahkamah majistret, tertuduh mengaku bersalah tanpa keraguan dan tanpa syarat terhadap kesalahan di bawah s 10(a) Akta Perdagangan Antarabangsa Mengenai Spesies Terancam 2008 ('Akta') kerana mengeksport tanpa permit, 95 ular jenis Boa Constrictor ('ular') yang diperuntukkan di bawah spesies terjadual dalam Jadual Ketiga, Lampiran 2 Akta. Menurut tertuduh, dia telah gagal menunjukkan apa-apa permit di bawah Akta tersebut untuk mengeksport ular-ular yang dirampas di Terminal Lapangan Terbang

A Antarabangsa Kuala Lumpur. Dalam mitigasinya, tertuduh telah menegaskan bahawa dia telah mengaku bersalah sebagai pesalah pertama, dengan demikian menjimatkan masa kehakiman dan kos memanggil saksi-saksi; dia telah menyesal; dia telah memohon maaf dan berjanji tidak akan mengulangi kesalahan tersebut pada masa akan datang; tiada faktor-faktor yang B mewajarkan hukuman berat; tiada penggunaan kekerasan jenayah seperti jenayah-jenayah lain; tertuduh mempunyai permit untuk mengimport ular tetapi tidak mempunyai permit eksport; dan bahawa ular-ular tersebut telah ditemui dalam keadaan yang baik dan tiada kerugian disebabkan kepada sesiapa pun. Pihak pendakwaan menghujahkan bahawa Malaysia tidak harus C dijadikan pusat transit di mata masyarakat antarabangsa dan bahawa ini merupakan kes pertama tertuduh di Malaysia. Kesalahan tersebut, selanjutnya dihujahkan oleh pihak pendakwaan, adalah bersifat serius dan hukuman maksimum adalah sama ada denda sebanyak RM1 juta atau hukuman penjara tujuh tahun atau kedua-duanya sekali. Seterusnya, turut dikemukakan juga D bahawa hukuman berat dengan cara hukuman penjara, sebagai tambahan kepada denda, sewajarnya dijatuhkan supaya penyeludupan hidupan liar tidak berbaloi. Majistret, menerima pengakuan bersalah oleh tertuduh dan menyabitkan dan menjatuhkan hukuman penjara enam bulan dan denda berjumlah RM190,000 dan sekiranya gagal, 12 bulan penjara. Walau E bagaimanapun, keputusan tersebut telah diakas oleh Mahkamah Tinggi yang mengetepikan hukuman dan menggantikannya dengan hukuman penjara lima tahun, tanpa denda dan memerintahkan bahawa RM190,000 tersebut dibayar balik kepada tertuduh. Dalam rayuan ini, tertuduh menimbulkan persoalan tentang kepentingan awam yang besar, khususnya berhubung dengan F prinsip-prinsip asas menjatuhkan hukuman.

**Diputuskan**, membenarkan rayuan:

(1) Seksyen 87 Akta Mahkamah Rendah 1948 menetapkan hak maksimum lima tahun penjara dan denda sebanyak RM10, 000 sebagai bidang kuasa G maksimum dalam menjatuhkan hukuman di mahkamah majistret. Dituduh di mahkamah majistret, bidang kuasa menjatuhkan hukuman mahkamah majistret di bawah s 87 terpakai ke atas tertuduh. Dalam menjatuhkan hukuman penjara lima tahun, hakim Mahkamah Tinggi telah sewajarnya mengawardkan hukuman maksimum penjara yang H mana mahkamah majistret sebagai mahkamah yang menjatuhkan hukuman boleh jatuhkan di bawah undang-undang. Hukuman maksimum sebegini dikhususkan dari segi undang-undang bagi kesalahan yang paling serius, tanpa apa-apa faktor mitigasi (lihat I perenggan 10–11).

(2) Yang Arif hakim Mahkamah Tinggi juga gagal untuk mengambil kira pengakuan bersalah oleh tertuduh. Ia adalah undang-undang mantap bahawa pengakuan bersalah tertuduh adalah satu faktor mitigasi dan 'pesalah pertama' telah diiktiraf sebagai faktor mitigasi. Pengakuan

bersalah oleh tertuduh membenarkan mahkamah untuk menggunakan budi bicara untuk memberi diskaun atau pengurangan satu perempat atau satu pertiga daripada hukuman yang akan dikenakan selepas perbicaraan penuh (lihat perenggan 12–13).

(3) Tertuduh didakwa dengan kesalahan mengeksport ular tanpa permit dan tidak didakwa 'memperdagang' kehidupan liar. Dia telah mengimport secara sah dan tidak menyeludup haiwan-haiwan tersebut ke dalam negara ini. Tidak terdapat bukti yang menunjukkan bahawa dia tidak akan diberikan permit untuk mengeksport haiwan oleh pihak berkuasa dan tiada bukti yang menunjukkan bahawa dia sengaja tidak memohon permit kerana dia tahu bahawa dia tidak akan diberikan permit (lihat perenggan 16–17).

(4) Tertuduh telah menghabiskan masa selama 17 1/2 bulan di dalam penjara kerana tidak ada penangguhan pelaksanaan hukuman penjara yang diberikan oleh Mahkamah Tinggi. Tempoh 17 1/2 bulan memuaskan kepentingan keadilan. Mahkamah mengetepikan hukuman lima tahun penjara yang dijatuhkan oleh Mahkamah Tinggi dan menggantikannya dengan hukuman 17 1/2 bulan (lihat perenggan 19–21).]

**Notes**

For cases on principles, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4819–4858.

**Cases referred to**

*Melvani v PP* [1971] 1 MLJ 137; [1971] 1 LNS 78 (refd)
*Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, SC (refd)
*PP v Jafa bin Daud* [1981] 1 MLJ 315 (refd)
*PP v Ravindran & Ors* [1993] 1 MLJ 45, HC (refd)
*Sau Soo Kim v PP* [1975] 2 MLJ 134, FC (refd)
*Zaidon bin Shariff v PP* [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

**Legislation referred to**

International Trade in Endangered Species Act 2008 s 10(a), Third Schedule, Appendix 2
Subordinate Courts Act 1948 s 87

**Appeal from**: Criminal Appeal No 41H-228 of 2010 (High Court, Shah Alam)

*Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him) (Shafee & Co) for the appellant.*
*Manoj Kurup (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Low Hop Bing JCA (delivering judgment of the court):**

APPEAL

**[1]** This appeal, by the accused against the sentence of five-year imprisonment imposed by the High Court, raises a question of immense public importance, particularly in relation to the fundamental principles of sentencing.

SENTENCE AND FACTORS FOR CONSIDERATION

**[2]** At the outset, we find it necessary to state that the sentence to be imposed on an accused in each particular case must have a direct bearing on:

(a) the specific charge preferred against the accused;

(b) the plea of the accused ie whether he has pleaded guilty or claimed trial;

(c) the facts admitted by the accused who has pleaded guilty or proved against him where the accused had claimed trial;

(d) the mitigating factors raised for an accused in the court of first instance;

(e) the request of the prosecution in urging the sentencing court to consider an appropriate sentence based on admitted or proved facts;

(f) the maximum sentencing jurisdiction of the court of first instance hearing the particular case;

(g) the exercise of discretion which Parliament has in the specific Act or Acts vested in the sentencing court;

(h) the consideration of all relevant facts and circumstances in imposing an appropriate sentence in each particular case including the balancing of the interest of the public and that of the accused;

(i) the manifest excessiveness or inadequacy of the specific sentence imposed by the sentencing court according to law as enacted by Parliament; and

(j) the aggravating or mitigating factors raised for the prosecution and the accused respectively.

FACTUAL BACKGROUND

**[3]** In the instant appeal, originating from the magistrate's court, the accused

had pleaded guilty without reservation, and indeed unconditionally, to an offence under s 10(a) of the International Trade in Endangered Species Act 2008 ('s 10(a)'), to wit, exporting without permit 95 Boa Constrictor snakes ('the snakes') which belong to a scheduled species in the Third Schedule, Appendix 2 to the said Act.

**[4]** In essence, the facts admitted by the accused revealed that the accused had failed to show any permit under the said Act to export the snakes which were subsequently seized at the Kuala Lumpur International Airport (KLIA) Terminal. The accused had wanted to export those snakes to Jakarta, Indonesia via flight MH 727. In short, it was an offence under s 10(a).

MITIGATION

**[5]** By way of mitigation, the accused's learned counsel submitted in the magistrate's court that:

(a) the accused has pleaded guilty as a first offender, thereby saving judicial time and the costs of calling witnesses;

(b) the accused has repented and is remorseful;

(c) the accused has apologised and promised not to repeat the offence in future;

(d) there are no aggravating factors to merit a heavy sentence;

(e) there is no criminal force used, unlike other serious crimes such as murder, rape, robbery and the like;

(f) the accused has a permit to import the snakes, but does not have an export permit; and

(g) the snakes were found in good conditions and no loss was caused to anybody.

**[6]** The learned legal adviser who appeared as deputy public prosecutor for the Wild Life Department argued that:

(a) this is a serious offence involving protected species of wild life and the maximum sentence is either a fine of RM1m or seven years imprisonment or both;

(b) wild life smuggling is serious offence which must be prevented as such activity can bring about the extinction of the species;

(c) Malaysia and other countries have agreed to co-operate and preserve this wild life species and the said Act was to serve this purpose;

A (d) Malaysia should not be made a transit point in the eyes of the international community;

(e) this is the accused's first case in Malaysia; and

B (f) a deterrent sentence by way of custodial sentence, in addition to a fine, should be imposed so that wild life smuggling is not worth a risk.

SENTENCE IMPOSED BY THE MAGISTRATE'S COURT

C

**[7]** The learned magistrate has considered the charge, the accused's guilty plea, the exhibits, the submissions of learned deputy public prosecutor and defence counsel. He has accepted the accused's guilty plea, convicted and sentenced him to six months imprisonment from 6 September 2010, in D addition to a fine of RM2,000 on each of the snakes, amounting to RM190,000, in default of payment of the fine, 12 months imprisonment.

DECISION OF THE HIGH COURT ON APPEAL

E **[8]** The learned judge of the High Court allowed the public prosecutor's appeal, set aside the sentence imposed by the learned magistrate, and substituted it with a five-year imprisonment term, without a fine, and ordered the RM190,000 fine to be refunded to the accused.

F LEAVE TO APPEAL TO THE COURT OF APPEAL

**[9]** The accused has obtained leave to appeal to this court as the apex court for appeals from subordinate courts.

G ORDER OF THE COURT OF APPEAL

**[10]** In the instant appeal, we note that the prosecution has preferred the charge against the accused in the magistrate's court. That being the case, the H sentencing jurisdiction of the magistrate's court under s 87 of the Subordinate Courts Act 1948 applies. Section 87 sets the ceiling of five-year imprisonment and a fine of RM10,000 as maximum sentencing jurisdiction of the magistrate's court.

I **[11]** In imposing the five-year imprisonment term on the accused, the learned High Court judge has indeed awarded the maximum custodial sentence which the magistrate's court as the sentencing court can impose according to law. This kind of maximum sentence is legally reserved for the most serious offence, without any mitigating factor. We note that the learned

High Court judge's grounds of judgment did not make any reference to the accused's guilty plea. The learned judge does not appear to have been taken this into consideration.

**[12]** It is trite law that accused's guilty plea is a mitigating factor: see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 per Lee Hun Hoe J (B); and *Melvani v Public Prosecutor* [1971] 1 MLJ 137; [1971] 1 LNS 78 per Wee Chong Jin CJ (Singapore) (as then was) who also considered 'first offender' as another mitigating factor, as has been done by Mohamed Azmi J (later FCJ) in *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315. As alluded to above, learned deputy public prosecutor has taken the position that 'This is the accused's first case in Malaysia'.

**[13]** Generally, the accused's guilty plea also allows the court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial: *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, as followed in *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45.

**[14]** The sentencing discretion belongs to the court of first instance as the sentencing court: *Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441 at p 445.

**[15]** With the utmost respect, the learned judge has erroneously taken into consideration the following factors:

(a) the squeezing of the snakes into a small bag and torturing them, when the facts admitted by the accused did not reveal this;

(b) the two allegedly venomous Rhinoceros vipers which were not in the charge preferred against the accused; and

(c) the accused's greed in profit-making which was again not part of the admitted facts.

**[16]** It must be emphasised immediately that the accused was charged with the offence of exporting the snakes without a permit. That is the gravamen and substratum of the prosecution's case against the accused who had pleaded guilty to that charge only, and no other.

**[17]** We wish to also emphasise that the accused was not charged with 'trafficking' in wild life. He had lawfully imported the animals into the country with a permit. He had not smuggled the animals into the country. There was no evidence to suggest that he would not have been granted the permit to export the animals by the authorities. There was no evidence to suggest that he

A intentionally did not apply for the permit because he knew that he would not be granted the said permit. (I am grateful to my learned brother KN Segara JCA who has suggested this passage for inclusion herein as part of our judgment).

B **[18]** Any other considerations would be outside the ambit of the charge and therefore warrant appellate intervention.

**[19]** We understand that since 7 September 2010, the accused has spent his time in prison ie for 17 1/2 months, as there was no stay of execution of the C custodial sentence imposed by the High Court.

**[20]** In the circumstances, on the facts of this case, we are unanimously of the view that the said 17 1/2 months imprisonment would serve the interests of justice.
D

**[21]** We therefore allow this appeal, set aside the five-year custodial sentence imposed by the High Court and substitute it with a sentence of 17 1/2 months ie the period from 7 September 2010 until today. The accused would walk out of the court today as a free man. The 17 1/4 months would translate into a total E period of some 23 months if the one-third remission were to be taken into consideration.

**[22]** In view of the custodial sentence which the appellant has served, we affirm the order of the High Court in setting aside the fine of RM190,000 F imposed on the accused as that fine was plainly beyond the RM10,000 maximum fine which the learned magistrate can legally impose.

*Appeal allowed.*

G

Reported by Afiq Mohamad Noor

H

I